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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/719,625	11/21/2003	Charles R. Barmore	D-43664-01	3475
28236	7590	08/24/2005	EXAMINER	
CRYOVAC, INC. SEALED AIR CORP P.O. BOX 464 DUNCAN, SC 29334			MIGGINS, MICHAEL C	
			ART UNIT	PAPER NUMBER
			1772	

DATE MAILED: 08/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

10/719,625

Applicant(s)

BARMORE ET AL.

Examiner

Michael C. Miggins

Art Unit

1772

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 06 June 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-7 is/are pending in the application.
- 4a) Of the above claim(s) 3, 5 and 6 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 4 and 7 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 5/16/05, 1/6/05, 9/14/04, 8/23/04, 7/14/04, 3/25/04, 3/15/04
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Election/Restrictions*

1. Applicant's election without traverse of claims 1-2, 4 and 7 in the reply filed on 6/6/05 is acknowledged.

### *Double Patenting*

2. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 1-2, 4 and 7 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-15 of U.S. Patent No. 6,689,438 (herein referred to as Kennedy). Although the conflicting claims are not identical, they are not patentably distinct from each other because Kennedy's claims completely encompass the subject matter of applicant's recited claims 1-2, 4 and 7.

Kennedy recites a rigid container (since a tray is a rigid container, see claim 6) comprising an oxygen barrier having an oxygen transmission rate of no more than 100

Art Unit: 1772

cc/m<sup>2</sup>/24hr at 25 degrees C, 0% RH, 1 atm, an oxygen scavenger and an oxygen indicator, all in various configurations (see claims 1-15).

The claims of Kennedy differ from the instant claims only in the fact that the claims of Kennedy recite some additional features (e.g. trays, liners etc.). It would have been obvious to one of ordinary skill in the art at the time applicant's invention was made to have omitted the additional features in order to lower production costs/time.

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1-2 and 4 are rejected under 35 U.S.C. 103(a) as being unpatentable over Speer et al. (US 5529833) in view of Putnam et al. (US 6794191).

Speer discloses a rigid container (column 3, lines 64-67) comprising an oxygen barrier having an oxygen transmission rate of no more than 100 cc/m<sup>2</sup>/24hr at 25 degrees C, 0% RH, 1 atm (column 7, lines 12-28, column 9, lines 46-62), an oxygen scavenger, all in various configurations (column 11, lines 4-25, column 12, lines 12-32).

The difference between the instant claims and Speer is that Speer does not disclose an oxygen indicator comprising a luminescent compound.

Putnam discloses an oxygen indicator in a polymer film (column 2, lines 54-67) laminated on a barrier film (column 3, lines 55-61), wherein the oxygen indicator has a

Art Unit: 1772

luminescent compound (column 5, lines 10-20) for use in food packaging as an inner or outer layer (column 6, lines 1-15) for the purpose of accurately detecting oxygen in packaging (applies to instant claims 1-2 and 4).

Therefore it would have been obvious to one of ordinary skill in the art at the time applicant's invention was made to have provided an oxygen indicator comprising a luminescent compound in the container of Speer in order to provide detection of oxygen in the packaging accurately as taught or suggested by Putnam.

In claims 2 and 4 applicant recites various layer configurations for the barrier, scavenger and indicator layers. A rearrangement of the essential working components of a product absent clear and convincing evidence of an unexpected result is obvious and well within the level of one of ordinary skill in the art (MPEP 2144) especially since Putnam suggests that the indicator can be an inner or outer layer and Speer discloses a variety of configurations for the layers in a container as discussed above. Therefore it would have been obvious to configure the layers as recited by applicant in order to prevent ingress of oxygen and to accurately detect the ingress of oxygen (applies to instant claims 2 and 4).

6. Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over Speer et al. (US 5529833) in view of Putnam et al. (US 6794191), as applied to instant claims 1-2 and 4 above, and further in view of Inoue et al. (US 5358876).

The difference between the instant claim and Speer is that Speer fails to disclose an oxygen indicator which comprises all or part of a printed image.

Art Unit: 1772

Inoue discloses an oxygen indicator which comprises all or part of a printed image (column 3, line 34 through column 4, line 19) in packaging for the purpose of providing decorative indication of the presence of oxygen in packaging.

Therefore it would have been obvious to one of ordinary skill in the art at the time applicant's invention was made to have provided an oxygen indicator which comprises all or part of a printed image in the package of Speer in order to provide decorative indication of the presence of oxygen in packaging as taught or suggested by Inoue.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael C. Miggins whose telephone number is 571-272-1494. The examiner can normally be reached on 1:00-10:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Harold Y. Pyon can be reached on 571-272-1498. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

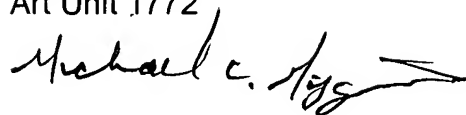
Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Application/Control Number: 10/719,625  
Art Unit: 1772

Page 6

MCM  
August 18, 2005

Michael C. Miggins  
Primary Examiner  
Art Unit 1772

A handwritten signature in black ink, appearing to read "Michael C. Miggins", with a stylized flourish at the end.